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No. 04-5462

Supreme Court, U.S.
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In The
Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED IN THIS CAPITAL CASE

Questions related to the *Simmons v. South Carolina*, 512 U.S. 154 (1994), issue:

1. Does *Simmons* require a life-without-parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from a lengthy prison term; and the prosecutor argues that the defendant is a frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him?

2. Is the state court decision denying the *Simmons* claim "contrary to" and/or an "unreasonable application" of clearly established Supreme Court law where the state court held that a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about parole eligibility and rehabilitation and the prosecution's actual evidence and argument?

Questions related to counsel's ineffective assistance at capital sentencing:

3. Has a defendant received effective representation at capital sentencing where counsel does not review prior conviction records counsel knows the prosecution will use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?

QUESTIONS PRESENTED IN THIS CAPITAL CASE – Continued

4. Has a defendant received effective representation at capital sentencing where counsel's background mitigation investigation is limited to conversations with a few family members; where the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation; where other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and where the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances?

5. Does counsel's ineffectiveness warrant habeas relief under the AEDPA where the state court sought to excuse counsel's failure to obtain any records about the defendant's history by saying the records contained some information that was "not entirely helpful," by saying counsel hired mental health experts (even though those experts did not do any background investigation and never saw the records), and by saying counsel spoke to some family members (even though those family members told counsel they knew little about the defendant and could not help with mitigation); and where the state court did not even try to address counsel's failure to interview other family members (who knew the defendant's mitigating history) or counsel's complete failure to investigate the aggravation that the prosecution told counsel it would use?

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OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court on direct appeal is *Commonwealth v. Rompilla*, 653 A.2d 626 (Pa. 1995), JA241. The opinion of the state post-conviction hearing court is *Commonwealth v. Rompilla*, No. 682/1988 (Lehigh Cty. C.C.P. Aug. 21, 1996), JA258. The opinion of the Pennsylvania Supreme Court on post-conviction appeal is *Commonwealth v. Rompilla*, 721 A.2d 786 (Pa. 1998), JA269. The opinion of the United States District Court is *Rompilla v. Horn*, 2000 WL 964750 (E.D. Pa.), JA1280. The Third Circuit opinions are *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), JA1325, and *Rompilla v. Horn*, 359 F.3d 310 (3d Cir. 2004) (denying rehearing), JA1448.

JURISDICTION

This Court granted *certiorari* on September 28, 2004, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence."

The Fourteenth Amendment to the United States Constitution states: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE[1]

A. Trial And Capital Sentencing Proceedings.

Petitioner was tried in the Lehigh County, Pennsylvania, Court of Common Pleas in 1988. He was represented by two public defenders, Maria Dantos and Fred Charles.[2]

[1] All emphasis herein is supplied unless otherwise indicated. The Joint Appendix and Lodging are cited as "JA" and "L," respectively, followed by the page number.

[2] Ms. Dantos was 2½ years out of law school. JA466. This was her first homicide case. JA471. She had "the majority of the client contact" and primary responsibility for preparing and presenting the capital

(Continued on following page)

The Commonwealth's guilt-phase case was that this was a "brutal murder" during a burglary in a bar, where the bar owner was assaulted with a knife, "stabbed repeatedly," severely beaten, "set on fire," and left "lying . . . in a pool of blood." JA241-244, JA255. The jury convicted Petitioner of first-degree murder and related offenses.

At capital sentencing, the prosecutor asserted three aggravating circumstances: Petitioner killed while committing other felonies, 42 Pa.C.S. § 9711(d)(6); the "offense was committed by means of torture," § 9711(d)(8); and Petitioner had "a significant history of felony convictions involving the use or threat of violence to the person," § 9711(d)(9). JA254-255.

The prosecutor introduced much evidence about Petitioner's prior convictions. JA44-89. They arose from a burglary in a bar, during which the bar owner was assaulted with a knife and raped. *Id.* The prosecutor had a member of his office read to the jury the transcript of the victim's testimony in the prior case – she described Petitioner as extremely violent. JA54-89.

From the custodian of the prior convictions records and on cross-examination of defense witnesses, the prosecutor elicited that Petitioner spent approximately thirteen years in prison for the prior convictions. JA46-47, JA127, JA131. The prosecutor elicited that Petitioner was released on parole from the prior convictions 3½ months

sentencing phase, including contacting and communicating with mental health experts. JA116, JA466, JA471, JA634, JA686-687. Mr. Charles, who was primarily responsible for the guilt-phase and "had the last say" on the case, had represented a few "potentially" capital clients, but had never prepared for or conducted a capital sentencing. JA634-635, JA655-656.

before this offense. JA126-127, JA131-132. The prosecutor elicited that when prisoners are paroled in Pennsylvania they are "just put . . . out on the street" without "help" or "rehabilitat[ion]." JA141-142. The prosecutor elicited that Petitioner was not able to rehabilitate himself. JA142. The jury also heard that Petitioner tried to get into a "Halfway House" when he was paroled, but "they couldn't give it to him, because . . . it was full." JA129. The jury heard that Petitioner "couldn't adjust" to life outside prison. JA130.

The prosecutor presented testimony from a pathologist, who was asked to discuss the decedent's injuries, which included abrasions, lacerations, blunt force injuries, a fractured nose, multiple stab wounds and burns; and who opined that Petitioner was "deliberately trying to cause pain." JA91-100, JA255.

Defense counsel's penalty-phase case was twenty transcript pages of testimony. Family members said they loved Petitioner; he was nice and helped around the house during the three months between his release on parole and this crime; they believed he was innocent; and they wanted mercy. JA123-149. Counsel argued for mercy based on this testimony. JA156-161.

The prosecutor's sentencing argument, JA161-167, detailed the multiple injuries to the decedent. He asserted that Petitioner is a cold-blooded killer without "one bit of mercy." JA162. He claimed Petitioner is "very violent" and "brutal," and "savagely, brutally, killed" while "torturing" the decedent with the "intent to cause substantial pain and suffering," leaving the decedent "lying in a pool of blood." JA162-164, JA166-167.

The prosecutor called Petitioner "a very strong individual, very violent individual." JA163. He said Petitioner's prior crimes were "brutal," JA165, and:

> [I]sn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from Joe's Bar, takes a taxi the night of this crime. He slashes Joe in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes.

JA165. But, the prosecutor said, there was "one major difference" between the prior crimes and this one – the prior victim "lived through her experience," while this victim was killed. JA165.

The prosecutor emphasized that Petitioner "*learned a lesson* from Joe Macrenna in that case, that rape case. That lesson was *don't leave any witnesses. Don't leave anyone behind* that can testify against you. *Don't leave any eyewitnesses. . . .*" JA166.

The judge instructed that the jury's sentencing options were "death" or "life imprisonment." JA14, JA41, JA167. The judge did not instruct that life imprisonment in Pennsylvania is without parole.

The jury interrupted its deliberations three times with questions for the court. After 45 minutes of deliberations, the jury asked, "*If a life sentence is imposed, is there any possibility of the defendant ever being paroled*?" JA183.

Defense counsel noted, "Because of the misconceptions, a lot of people think that if you get a life sentence, you're out in five years or three years." JA181. The judge responded, "I can't stop that." JA182. The judge told the jury:

> I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I – if there were other alternatives that you should consider, we would have outlined them in the Charge, all right.

JA183.

After 7½ hours, the jury asked about "the *length* of the sentence" on Petitioner's prior convictions; if the sentence "was *commuted* in any way"; and if he "got *released* on behavioral." JA200-201. In the jury's presence, the prosecutor said, "You can't tell them"; the judge told the jury, "Well, that we can't give you." JA201. The jury then deliberated for another hour before recessing for the night. JA209-210.

The following day, the jury deliberated for 55 minutes, then asked: "Was the defendant offered any type of rehabilitation either while in prison or after his release from prison?" JA216. The judge responded:

> Well, I'm sorry to say, I can't answer that. I can only tell you that you're going to have to make your decision based upon the evidence that was presented and in accordance with the Law with respect to Sentencing Hearing. First of all, I

> couldn't even answer it if I wanted to or if I could, I don't know.

JA216. The jury foreman then asked: "Could I change the question to the point that is – *isn't rehabilitation available in prison*?" JA216. In response, the judge instructed:

> Well, again, I would like to even answer that, and I can't. You're going to have to rely upon your own knowledge of that aspect if, indeed, that is a part that troubles the area that you're interested in. The penology system, I'll be quite frank with you, is not an issue before – before you with respect to the Law that it's a decision that you must make. I can understand your interest, however, as I say, we're constrained to, you know, comply with whatever evidence that was put on in the hearing and then your decision must be based upon whatever the Law says and whatever you may find.

JA216.

The jurors ultimately deliberated for approximately twelve hours. JA226. They "found all three of the aggravating circumstances alleged by the prosecution" and in mitigation found "'Rompilla's son being present and testifying' and the possibility of rehabilitation. The jury found that the aggravating circumstances outweighed the mitigating factors and sentenced Rompilla to death." JA1331. The Pennsylvania Supreme Court affirmed on direct appeal. JA241.

B. Post-Conviction Proceedings.

Trial counsel (Ms. Dantos and Mr. Charles) testified post-conviction that their investigation into Petitioner's

background consisted of conversations with Petitioner and some family members.[3] Counsel knew the people they spoke to were poor sources of information about Petitioner's history. The "overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody. . . . [T]here wasn't a lot that they knew." JA495; *see also* JA498 (family members to whom counsel spoke had "limited knowledge of" Petitioner). They were not "the type of family that would provide you information when asked," JA557; "it seemed pretty clear that they didn't feel as though they knew Ron very well, because there was a distance as a result of his being incarcerated and as a result of their own whatever was going on with them," JA557-558. Their "response [to questions] was they hardly know him. I mean one said, 'He was in a reformatory. He's been away the whole time. We didn't know him that well.' Things of that nature." JA669. Counsel testified that Petitioner, like the family members counsel spoke to, was not a good source of information. JA556-557, JA582-583, JA663, JA667.

The experts at the post-conviction hearing, including the Commonwealth's rebuttal expert, Dr. Dattilio, testified that Petitioner is a poor historian because of his brain damage, low intelligence, cognitive impairments, communication problems and memory deficits; moreover, he is the victim of childhood trauma, which is difficult even for an unimpaired person to discuss. JA1248-1249, JA1258-1261, JA1264 (Dr. Dattilio); JA1027 (Dr. Gross); JA889-890 (Dr.

[3] Trial counsel spoke to Petitioner's ex-wife; his "brother, Nick; his sister-in-law, Darlene; his brother, Bobby and his son Aaron." JA494.

Crown); JA960 (Dr. Armstrong). Similarly, the dysfunctional family history made it difficult for family members to discuss Petitioner's childhood. JA1259-1261, JA1264 (Dr. Dattilio); JA1027 (Dr. Gross). Trial counsel also believed the family was "coming from the position that Ronald was innocent. And, therefore, they weren't looking for reasons for why he might have done this." JA494. These problems were exacerbated because the lawyer who spoke to the family, Ms. Dantos, asked "general questions" – *e.g.*, was there "anything important or noteworthy about his family, upbringing?" – rather than specific questions about abuse, neglect, poverty, etc. JA478, JA497-498, JA549-551. The post-conviction expert testimony was that such general questions are inadequate when questioning people, like Petitioner and his family, who suffered childhood abuse and neglect. JA1260-1261 (Dr. Dattilio); JA1027 (Dr. Gross).

Although counsel knew the people they spoke to were not good sources of information, they *did not seek any records* about Petitioner's background. Records about Petitioner's prior convictions, prison records, juvenile records, school records and medical records were available, but not obtained by counsel. Counsel also made no effort to speak to two of Petitioner's sisters who were available locally, one of whom attended the trial.

The Commonwealth notified counsel pre-trial that it intended to introduce evidence about Petitioner's prior convictions in aggravation. Counsel knew pre-trial that the Commonwealth would use transcripts contained in the prior crimes court file. JA650. Pennsylvania law allowed the Commonwealth to introduce the "facts and circumstances" of the prior crimes at capital sentencing. *See Commonwealth v. Beasley*, 479 A.2d 460, 465 (Pa. 1984);

Commonwealth v. Holcomb, 498 A.2d 833, 851 n.18 (Pa. 1985).

Petitioner's prior convictions file was available in the clerk's office in the same courthouse where the capital trial was held. When the prosecutor used materials from that file at capital sentencing, counsel complained that they had not seen the file. The prosecutor replied, "[I]t's a public record, . . . you could have . . . looked at it just like I did." JA28; *see also* JA36 (prosecutor says to counsel that prior convictions file is "a public record, and you could have gotten the Transcript [from that file] at any time prior to this Trial.").

The court file from Petitioner's prior convictions contained prison records, L31-40, created in connection with those convictions. *See* JA631. It contained "achievement test" scores showing that Petitioner, as an adult, had not progressed beyond 3rd grade level in spelling and arithmetic, with abilities below 96% of the population. L35. It states that Petitioner left school after 9th grade. L33-34. It notes that he led a "nomadic existence" before his arrest. L40. These court/prison records also include results from the Minnesota Multi-Phasic Personality Inventory ("MMPI"), a psychological test, which was administered when Petitioner entered prison for the prior convictions. The test showed abnormalities on the schizophrenia, paranoia, neurosis and obsessive/compulsive scales. L35.[4] The records state that Petitioner is an alcoholic

[4] The Commonwealth's post-conviction expert, Dr. Dattilio, testified that these MMPI results demonstrate mental disturbances of a type associated with brain damage and childhood abuse and neglect. JA1225-1229. *See also* JA856-857, JA930 (Dr. Crown); JA1050-1051 (Dr. Gross).

and needed "counseling pertaining to his longstanding abuse of alcohol." L39. The records note that his criminal history is "related to his overindulgence in alcoholic beverages." L40. They note that he was the "6th of nine children raised in [a] slum environment." L40. Counsel did not read the court/prison records. The jury did not hear this mitigating evidence.

Petitioner's juvenile court records, L41-49, were referred to in the prior convictions court records, and contain information about Petitioner's mental deficiencies and dysfunctional childhood home. The juvenile records contain reports from the Allentown School District, dated November 20, 1964 and January 6, 1965 (when Petitioner was sixteen years old). L47-48. The school district reported that Petitioner's IQ is 69. L47.[5] He was "in a special education program." L48. He "is easily influenced by others into different events, no matter if it is bad or good," L47, and it "seems he lacked strong disciplined leadership outside of school and in the home to provide influences to lead to better accomplishment," L48. A juvenile court "summary" dated November 27, 1964, L43-46, also notes that Petitioner was in the "Special class" at his school. L44. The "summary" states that both of Petitioner's older brothers were incarcerated, L43, and that "Ronald comes from the Notorious Rompilla Family which has been known to the Lehigh County Courts on many occasions. The parents appeared to be cooperative but their past record indicates failure of handling there [sic] off-spring."

[5] IQ scores below 75 generally are considered to be in the mentally retarded range. *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002) (citing 2 Kaplan & Sadock's Comprehensive Textbook of Psychiatry 2952 (B. Sadock & V. Sadock eds. 7th ed. 2000)).

L45. The "summary" notes that Petitioner was born into a home that came to the attention of the City Health Department because of "neglected children" when "the mother was picked up by the police in a drunken condition at which time the Probation Office was obliged to enter into the home and . . . the children were placed in a hospital and the home of relatives." L44. Then,

> Over a period of years the mother was missing from home frequently for a period of one or several weeks at a time; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. Always upon return home the husband took her back into the house even though he complained about her absence; there was never any prosecution for her desertion of family nor her moral episodes. She has been reported over a period of years to be frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of her home at all times.

L44. Counsel did not obtain these records. The jury did not hear this mitigation.

Petitioner's juvenile records note that additional family history information is contained in the juvenile records of his brother, Nick Rompilla. These records, L49-110, also confirm that Petitioner's childhood home was dysfunctional. Several reports corroborate the entries in Petitioner's juvenile records regarding the mother's alcoholism, abandonment and neglect of the children, filthy home conditions, removal of the children from the home, etc. L93, L95, L104, L109. A 1951 report, when Petitioner was three years old, says the "family unit lives

in basement of cheap tenement house, filthy, upset, dirty beds, dirty clothing, worn out furniture." L107. A report dated April 6, 1957, when Petitioner was nine years old, states: "I regret to say that the home conditions in this family group have not changed. The mother still is neglecting her children with filth and lack of supervision existing at all times." L75. A 1960 report, when Petitioner was twelve years old, notes that the "father-son relationships were weak," L95; the mother was an "alcoholic" who was "often off with other men," L93, L95; there were "poor home conditions," L95; there was "an unstable home situation," L95; there was "[n]eglect of children," L95; and the "children were always dirty," L93. The records also note that Petitioner's brother, Nick, was rejected by the Army because he "could not pass the mental test," L80, and that he had a "retarded mental condition," L82. Counsel did not seek these records. The jury did not know this information.

Petitioner's school records, L11-30, show that his IQ was repeatedly found in the mentally retarded range (*see* note 5, *supra*). At age six, his IQ score was 60. L11. At age nine, his "verbal" IQ score was 75, and the tester noted "many replies very irrelevant." L11, L15. At age eleven, his "verbal," "performance" and "full-scale" IQ scores were 61, 75 and 64. L11, L13. At age thirteen, they were 69, 75 and 69. L12, L14. Achievement tests show that his abilities never advanced above 3rd grade level. L11. After receiving all "D" grades in third grade, he was placed in special education classes, where he remained until he left school in 9th grade. L11. Counsel testified that they understood Petitioner "had problems in school," JA677-678, but they did not try to get the records. The jury did not hear this mitigating evidence.

Petitioner's medical records, L1-10, show that he was hospitalized at age two for dehydration, diarrhea and a fever exceeding 105°F. Counsel did not obtain these records.[6]

The school records were available in the public school building, across the street from the capital case courthouse; the prior convictions court/prison records were available in the clerk's office in the capital case courthouse; the juvenile records were available from the local juvenile court and are referred to in the prior convictions records; the medical records were available in the same local hospital where the Commonwealth had Petitioner's blood tested for this case. Counsel, however, looked at no background records about Petitioner's history. JA479, JA481, JA489-490, JA506-507, JA584, JA665, JA692-693, JA705.

Three of Petitioner's siblings (Randi Rompilla, JA745-779, Barbara Harris, JA804-822, and Nick Rompilla, JA779-804) testified post-conviction, corroborating the information in the records:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his

[6] Post-conviction expert testimony explained that these records are relevant to assessment of brain damage. JA853-855 (Dr. Crown); JA976-978 (Dr. Armstrong); JA1114–1115 (Dr. Sadoff).

> father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

JA1415-1416, *Rompilla v. Horn*, 355 F.3d at 279 (Sloviter, J., dissenting) (describing family post-conviction testimony; citations omitted); *see also* JA300-310 (habeas petition, detailing family post-conviction testimony). Counsel did not try to speak to either of these sisters, even though both lived locally and Randi attended the trial. JA757-758, JA769-770, JA814-815. The jury did not hear this mitigation.[7]

Trial counsel had Petitioner seen by mental health experts (Drs. Sadoff, Gross and Cooke). Counsel did not provide any background information about Petitioner to the doctors. Counsel did not ask the doctors to report on mitigation arising from Petitioner's life history, instead requesting opinions only about Petitioner's "mental state

[7] Nick briefly testified at capital sentencing (that he had visited Petitioner in prison before Petitioner was paroled, Petitioner had a hard time adjusting to life out of prison, Petitioner helped around the house between his release on parole and this crime, and Nick believed Petitioner was innocent), but not about the dysfunctional family background. JA128-131.

during the time of the alleged charges" and competency to stand trial. JA474, JA476.[8] Counsel assumed one expert, Dr. Cooke, would test Petitioner for brain damage, but did not ask Dr. Cooke to do such neuropsychological testing and then did not ask if it had been done. JA504-505, JA684-687. Dr. Cooke did a "rough estimate of intellectual function," but did not conduct neuropsychological testing. JA1061.[9]

The post-conviction experts (Drs. Armstrong and Crown) were provided background information and asked to evaluate Petitioner for mitigation in light of his history. They testified that Petitioner's history is replete with "red flags" about childhood trauma, brain damage, mental retardation, learning disabilities, mental and emotional disturbances, and alcoholism, and showed that full neuropsychological testing for brain damage, which they performed, was necessary. Based on the background information and their testing, they found Petitioner suffers from organic brain damage, serious psychological impairments and alcoholism. His impairments are severe, date back to childhood, and were likely caused by fetal alcohol exposure, head injuries and childhood trauma. JA826-938 (Dr. Crown); JA941-1013 (Dr. Armstrong); *see also* JA318-333 (habeas petition, detailing testimony of Drs. Crown and Armstrong).

The trial doctors (Drs. Sadoff, Gross and Cooke) also testified post-conviction that the records about Petitioner's

[8] Dr. Gross did not even know that counsel wanted a *mitigation* evaluation; he understood that counsel was interested in *guilt*-phase mental defenses. JA1041-1042, JA1050.

[9] Dr. Cooke testified post-conviction that he did not have the specific results of his evaluation. JA1068.

history provide substantial mitigation. They testified that Petitioner's history contains "red flags" for childhood abuse, brain damage, mental retardation, alcoholism and psychological impairments. Had trial counsel provided the background information to the trial doctors, they would have pursued the same type of full neuropsychological testing that was done by the post-conviction doctors, rather than the brief screening one of them (Dr. Cooke) did at trial. JA1015-1051 (Dr. Gross); JA1057-1080 (Dr. Cooke); JA1102-1135 (Dr. Sadoff); *see also* JA333-345 (habeas petition, detailing testimony of Drs. Cooke, Sadoff and Gross).

Similarly, the Commonwealth's post-conviction rebuttal psychologist, Dr. Dattilio, testified that Petitioner's records and history have numerous "red flags" indicating brain damage, mental retardation and a traumatic childhood. Petitioner's history has mitigating significance; it would lead a mental health expert to seek the type of testing and evaluations done by the post-conviction doctors (Drs. Crown and Armstrong). JA1162-1278 (Dr. Dattilio); *see also* JA350-355 (habeas petition, detailing Dr. Dattilio's testimony).

Trial counsel testified at the post-conviction hearing that they did not withhold mitigation evidence from the jury for tactical or strategic reasons – they agreed they would have pursued the mitigating evidence about Petitioner if they had known about it. JA479, JA482-486, JA489-490, JA493, JA497, JA501, JA509-511, JA552-554.

The Court of Common Pleas denied post-conviction relief. JA257. The Pennsylvania Supreme Court affirmed. JA269. Pennsylvania Chief Justice Flaherty dissented. Relying on *Simmons v. South Carolina*, 512 U.S. 154

(1994), he explained that Petitioner's future dangerousness was at issue and the trial court should have instructed that life imprisonment is without parole in Pennsylvania. JA286.

Petitioner sought federal habeas relief. The District Court found counsel ineffective at capital sentencing because they failed to reasonably investigate. JA1280 (relying on *Williams v. Taylor*, 529 U.S. 362 (2000) and *Strickland v. Washington*, 466 U.S. 668 (1984)). The Third Circuit panel, in a 2-1 decision, reversed. JA1325. Rehearing *en banc* was denied by a closely divided (6-5) Circuit. JA1448. The Circuit dissenters would have upheld the District Court's grant of relief because of counsel's capital sentencing ineffectiveness, JA1405-1427, JA1448-1453, and, like Pennsylvania Chief Justice Flaherty, would have granted relief under *Simmons*, JA1427-1447.

SUMMARY OF ARGUMENT

I. Habeas relief is appropriate under *Simmons*. The prosecutor presented and elicited evidence that Petitioner is a recidivist who committed crimes of extreme violence, culminating in this murder; Petitioner spent thirteen years in prison for his prior convictions; Petitioner was released on parole from the prior prison term; Petitioner committed this murder just 3½ months after being released on parole; prisoners are paroled in Pennsylvania without rehabilitation or assistance; and Petitioner was unable to rehabilitate himself.

The prosecutor then argued that Petitioner "learned a lesson" from his prior convictions and that "lesson was don't leave any witnesses. Don't leave anyone behind that

can testify against you. Don't leave any eyewitnesses." The prosecutor emphasized the extreme violence of this and the prior offenses. The prosecutor argued that Petitioner is "absolutely frightening" because he repeatedly commits similar crimes of violence. The prosecutor argued that Petitioner is "a very strong individual, very violent individual," who is "brutal," cold-blooded, and merciless.

The jurors received the future dangerousness message the prosecutor sent. Three times, the jurors interrupted their sentencing deliberations with questions for the court. They asked about parole eligibility and rehabilitation. The jurors were not told that life imprisonment for first-degree murder in Pennsylvania is without parole. They were denied a straight answer and allowed to think that parole might be available.

The state court unreasonably considered *only* the bare fact that the prosecution presented an aggravating circumstance about Petitioner's criminal history, while the state court ignored most of the reasons why the prosecutor's evidence and argument actually put future dangerousness in issue in this case. Moreover, the state court unreasonably assumed a jury will ignore the common sense connection between a violent criminal history and future dangerousness.

II. An effective lawyer in a capital case conducts a thorough investigation for mitigating evidence. Counsel here wanted to present Petitioner's mitigating evidence – they had no tactical reason for withholding mitigation about Petitioner's life history from this jury.

Prior convictions court records, incarceration records, school records, juvenile records and medical records were readily available to counsel – some just a short walk from

the trial courtroom. Counsel knew that Petitioner and the family members they spoke to were very poor sources of information. But counsel did not get *any* records about Petitioner's life. Neither did counsel speak to two of Petitioner's sisters who could have discussed Petitioner's history, although both were available locally and one attended the trial.

Counsel's failure to obtain any life history records was especially unreasonable. Counsel knew the people they spoke to were not good sources of information about Petitioner's history, but pursued no other sources. Pennsylvania lawyers know that adult and juvenile criminal records typically contain much life history and mental health information, but counsel here did not get the records. Counsel knew Petitioner had problems in school, but did not get records about his educational history. Counsel knew Petitioner was drinking heavily around the time of the crime and that a condition of his parole was to abstain from alcohol, but counsel did not seek background records about Petitioner's alcohol problems. Counsel knew Petitioner spent much of his life in prison, but did not obtain Petitioner's incarceration records. Counsel knew the prosecutor would introduce evidence from Petitioner's prior convictions court file, but counsel did not review those prior convictions records, even as part of an investigation of the prosecution's aggravation.

The records chronicled Petitioner's mental impairments and traumatic history – serious learning problems, special education placement, mental retardation, psychological disturbances, alcoholism and a childhood spent in an impoverished and dysfunctional home. The family members counsel failed to interview also would have provided mitigating information about Petitioner's history.

And this life history information, provided to mental health experts, would have led to development of further mitigating evidence, including evidence about Petitioner's brain damage. The jury heard none of this mitigating evidence.

Habeas review of prejudice is *de novo* because the state court did not address it. As to counsel's deficient investigation, the state court tried to excuse counsel's failure to obtain records about Petitioner's life history by saying the low IQ and learning disability records were "not entirely helpful." This is contrary to and an unreasonable application of clearly established federal law because it uses the contents of the records to justify counsel's failure to get them, when counsel did not know what the records contained. It is also unreasonable because these records actually would have provided helpful mitigation.

The state court also suggested that hiring mental health experts relieved counsel of the responsibility to investigate Petitioner's social history. But counsel did not ask the trial doctors to collect life history mitigation, and counsel gave no life history information to the doctors, whose post-conviction testimony showed that the records would have led to the development of much in mitigation.

Finally, the state court suggested that counsel had no duty to get records because counsel spoke to Petitioner and some family members. This is unreasonable because counsel knew the people they spoke to were not useful sources of information. An effective lawyer does not rely on a narrow set of unhelpful sources when trying to develop mitigating evidence in capital case. And an effective lawyer reads the court file about the client's prior convictions,

especially when the prosecutor tells counsel he will use evidence from that file in aggravation.

ARGUMENT

I. RELIEF SHOULD BE GRANTED UNDER *SIMMONS*.

Pennsylvania is the only state with a life-without-parole alternative to death where this information routinely is withheld from capital sentencing juries. Petitioner's death sentence is unconstitutional under this Court's holding in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The state court decision is an "unreasonable application of" clearly established federal law, 28 U.S.C. § 2254(d).

A. Petitioner's Death Sentence Violates *Simmons*.

"Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible." *Simmons*, 512 U.S. at 178 (O'Connor, J., concurring); *see also id.* at 163-64 (plurality). Petitioner's jurors were never informed that the only alternative to death is life without possibility of parole, even though they asked.

Petitioner's "future dangerousness [was] in issue." *Id.*, 512 U.S. at 178 (O'Connor, J., concurring). The prosecutor asserted that Petitioner is an extremely violent recidivist. Juries see prior violent crimes as predicting future violence,

as this Court often has noted.[10] The Pennsylvania Supreme Court, too, has recognized that jurors view prior violent crimes as predictive of future violence.[11] Indeed, the Pennsylvania Supreme Court had stated that the significant history of violent felonies aggravating circumstance, which the prosecution asserted and the jury found here, shows the defendant has "pronounced" and "uncontrolled recidivistic tendencies to violent assaults upon the person." *Commonwealth v. Holcomb*, 498 A.2d 833, 851-52 (Pa. 1985). Further, the suggestion of future violence was particularly strong here because the prior and current crimes were similar. *Id.* at 851-52 (especially "pronounced recidivist

[10] *E.g.*, *Nichols v. United States*, 511 U.S. 738, 752 (1994) (Souter, J., concurring) (prior crimes "predict[] the likelihood of recidivism"); *Heller v. Doe*, 509 U.S. 312, 323 (1993) ("Previous instances of violent behavior are an important indicator of future violent tendencies."); *Allen v. Illinois*, 478 U.S. 364, 371 (1986) (prior crimes "predict future behavior"); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is . . . inevitable."); *Johnson v. Texas*, 509 U.S. 350, 355-56 (1993) (future dangerousness shown by prior crimes); *Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (future dangerousness established through defendant's "significant criminal record" and failure to "rehabilitate himself"); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (jurors infer "propensity" for crime from prior crimes). As this Court recently reiterated, a "jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior" in the future. *Kelly v. South Carolina*, 534 U.S. 246, 253-54 (2002).

[11] *E.g.*, *Commonwealth v. Baker*, 614 A.2d 663, 676 (Pa. 1992) (prior convictions evidence allows capital sentencing jury to "explore the defendant's prior behavior and dangerousness before sanctions are imposed"); *Commonwealth v. Roots*, 393 A.2d 364, 368 (Pa. 1978) (prior crimes have "natural tendency . . . to be interpreted as indicative of the defendant's propensity to commit crime"); *Commonwealth v. Billa*, 555 A.2d 835, 841-42 (Pa. 1989) (same).

tendencies" when past crimes are similar to current crime).[12]

The prosecutor also elicited evidence that Petitioner was paroled from prior convictions just 3½ months before he committed this killing; that Pennsylvania parolees are released without assistance or rehabilitation services; and that Petitioner was unable to rehabilitate himself. This evidence confirmed the common belief that "parole [is] a mainstay of . . . sentencing regimes," *Simmons*, 512 U.S. at 169-70, and quite palpably showed that Petitioner is dangerous when released on parole.

The prosecutor's sentencing argument reinforced the future dangerousness message sent by his evidence. The prosecutor's argument that Petitioner "learned a lesson" from his prior convictions – to kill anyone who witnesses his crimes – firmly planted the idea that Petitioner would be dangerous if released. The prosecutor's assertions that Petitioner is violent, cold-blooded, brutal and merciless, and the prosecutor's emphasis on the "absolutely frightening . . . similarities" of Petitioner's repeated crimes, also highlighted the idea that Petitioner is a dangerous recidivist. The prosecutor thus encouraged the jury to see Petitioner as "absolutely frightening" because he repeatedly commits the same type of violent crimes when paroled.

[12] *See also Commonwealth v. Stanley*, 401 A.2d 1166, 1174 (Pa.Super. 1979) (jury especially likely to infer propensity for crime "when informed that the defendant's prior crime was the same as one of the crimes for which he is currently being tried"), *aff'd*, 446 A.2d 583 (Pa. 1982).

The message received was the message sent: this jury repeatedly interrupted its sentencing deliberations to ask questions that were "a clear expression of the jury's concern about the defendant's future dangerousness." JA286, *Commonwealth v. Rompilla*, 721 A.2d at 795 (Flaherty, C.J., dissenting).[13] As in *Simmons*, this jury was "denied a straight answer about . . . parole eligibility even when it was requested." *Id.*, 512 U.S. at 165-66 (plurality).[14] Petitioner's death sentence violates due process.

[13] *See also Simmons*, 512 U.S. at 170 n.10 (plurality) ("It almost goes without saying that" when jury interrupts deliberations to ask "Does the imposition of a life sentence carry with it the possibility of parole?", jury does not know "life" means without possibility of parole; otherwise, "there would have been no reason for the jury to inquire"); *id.* at 178 (O'Connor, J., concurring) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"); *California v. Ramos*, 463 U.S. 992, 1003 (1983) ("[T]he possibility that the defendant may be returned to society . . . invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society. [This] focuses the jury on the defendant's probable future dangerousness.").

[14] Here, as in *Simmons*, the judge told the jury it should not "consider" the possibility of parole. JA183. "Far from ensuring that the jury was not misled, however, this instruction actually suggested that parole *was* available but that the jury, for some unstated reason, should be blind to this fact." *Simmons*, 512 U.S. at 170 (plurality) (emphasis original). Moreover, this judge's response that "I can't answer that question," JA183, further suggested that parole might be available, but that the judge could not tell the jury about it, or it was outside the judge's control. Indeed, the jury likely viewed the judge's "I can't answer" response as being intended to protect Petitioner by *concealing his parole eligibility*, just as other court rulings had protected him by concealing other information from the jury. *See, e.g.*, JA161 (prosecutor introduces prior convictions and tells jury they were things "we weren't permitted to tell you in the trial"); JA42 ("I was not permitted to tell you about [the prior convictions] earlier").

B. Habeas Relief Is Appropriate.

The Pennsylvania Supreme Court was provided these reasons why future dangerousness was in issue. That Court ignored most of them, addressing instead just one matter: whether presentation of the significant history of violent felonies aggravating circumstance, by itself, puts future dangerousness in issue. It then denied relief by asserting that this aggravating circumstance "only addresses [Petitioner's] past conduct, not his future dangerousness." JA284, *Commonwealth v. Rompilla*, 721 A.2d at 795. The Pennsylvania Supreme Court's decision is an unreasonable application of clearly established federal law, 28 U.S.C. § 2254(d)(1).

The decision is "objectively unreasonable," *Williams*, 529 U.S. at 409, because it ignores most of the factors that actually made future dangerousness an issue *in this case*. *Id.* at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts, as shown by its "fail[ure] even to mention" them). The prosecutor injected far more than just the aggravating circumstance into the jury's sentencing deliberations: there was the prosecutor's evidence about the extreme violence of this and the prior crimes; the prosecutor's evidence about the similarities between this and the prior crimes; the way the prosecutor presented the prior crimes evidence (through the reading of the prior victim's testimony about Petitioner's violence); the prosecutor's elicitation that Petitioner was released on parole from his prior convictions; the prosecutor's elicitation that Petitioner killed within months after being released on parole; the prosecutor's elicitation that parolees are released without rehabilitation; the prosecutor's elicitation that Petitioner could not rehabilitate himself; the prosecutor's argument that

Petitioner is cold-blooded, merciless and brutal; the prosecutor's argument that Petitioner is "absolutely frightening" because he repeatedly commits similar violent crimes; and the prosecutor's claim that Petitioner "learned a lesson" from his prior convictions to kill anyone who might witness his repeated offenses. Beyond the simple presence of the aggravating circumstance, there also were the jury's repeated questions about parole eligibility and rehabilitation and the judge's responses, which suggested that parole might be available but the jury should not know about it. *See* note 14, *supra*. The state court ignored all of this and, thus, unreasonably applied *Simmons*.

It is also unreasonable to assume, as the state court did, that a jury hearing evidence of Petitioner's violent "past conduct" would ignore that such evidence also shows "future dangerousness." Jurors believe that past violence predicts future violence. *See Holcomb*, 498 A.2d at 851-52; notes 10, 11 & 12, *supra*. The relevance of Petitioner's prior violence to the significant history aggravating circumstance *does not negate* the fact that the prior violence is also relevant to future dangerousness. Past conduct is predictive of future behavior even when that past conduct is also relevant to other matters.[15] Courts require limiting instructions when prior

[15] *Nichols*, 511 U.S. at 752 (Souter, J., concurring) (explaining that prior crimes evidence "reflect[s] the seriousness of his past criminal conduct" *and* "predict[s] the likelihood of recidivism"); *Johnson*, 509 U.S. at 369 ("forward-looking perspective of the future dangerousness inquiry" is "not independent of an assessment of personal culpability," and same evidence may be relevant to both inquiries); *Skipper*, 476 U.S. at 6 (error to make "distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct"); *Baker*, 614 A.2d at 676 (prior crimes evidence is used by capital sentencing juries to "explore" *both* "prior

(Continued on following page)

crimes evidence is admitted precisely because jurors view such evidence as demonstrating a propensity for crime even when it is relevant to other matters.[16] It was unreasonable for the state court to assume this jury would not consider that Petitioner's violent history signaled his future dangerousness, especially given the prosecutor's overall presentation.

As for the Third Circuit majority, it never really addressed whether the state court's actual decision was reasonable. Instead, it said *Simmons* "may be read . . . narrowly" to require a no-parole instruction only when the prosecutor explicitly says the defendant is a future danger; it then deemed the state court decision "reasonable" for supposedly adopting this narrow view of *Simmons*. *See* JA1384-1391, *Rompilla v. Horn*, 355 F.3d at 264-67. But the *state court did not adopt the Third Circuit majority's restriction* on *Simmons*. The state court agreed with Petitioner that *Simmons* applies when future dangerousness is "at issue," but held that future dangerousness is not put "at issue" by the significant history of violent felonies aggravating circumstance standing alone. JA284, *Commonwealth v. Rompilla*, 721 A.2d at 795. Since the Third Circuit majority's restriction on *Simmons* was not

behavior *and* dangerousness"); *see also* MCCORMICK ON EVIDENCE at 259 (5th ed.) ("An item of evidence may be logically relevant in several aspects, leading to different inferences or bearing upon different issues."). As this Court recently reiterated: "Evidence of future dangerousness . . . is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences." *Kelly*, 534 U.S. at 254.

[16] *E.g.*, *Billa*, 555 A.2d at 841 (other crimes evidence must be accompanied by limiting instructions to protect against jury's natural tendency to treat it as proof of propensity for crime); *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (same).

actually relied upon by the state court, it "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins v. Smith*, 123 S.Ct. 2527, 2539 (2003).

To be sure, this prosecutor *did argue future dangerousness*. This prosecutor asserted that Petitioner is "absolutely frightening" because he is a cold-blooded, violent recidivist who repeats the same type of violent crimes every time he is released from prison and because he "learned a lesson" from his prior convictions that he should kill any witness to his crimes.[17]

The Circuit majority tried to avoid the obvious import of the prosecutor's argument by saying the prosecutor's comments may have been intended to "explain why there was no eyewitness to the most recent crime." JA1401, *Rompilla v. Horn*, 355 F.3d at 272. The Circuit majority's approach, which looks to the possible motive for the prosecutor's statements rather than their effect on the jury, is akin to the position taken by the dissent in *Simmons*. *See id.*, 512 U.S. at 181-82 (Scalia, J., dissenting) (stating that "in context," the prosecutor's argument "was not made . . . in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence"). *Simmons* rejected the Circuit majority's approach. In *Simmons*, as in other contexts, constitutional significance depends on the jurors' "reasonable understanding." *See* JA1444, *Rompilla v. Horn*, 355 F.3d at 292 (Sloviter, J., dissenting); *see also Strickler v. Greene*, 527

[17] As in *Kelly*, 534 U.S. at 254 n.4, this Court need not decide here if a no-parole instruction is required "when the State's evidence shows future dangerousness but the prosecutor does not argue it."

U.S. 263, 288 (1999) (due process assesses "fairness of the proceeding," not intent of prosecutor). Whatever the prosecutor's intent, he sent the message to this jury that Petitioner is dangerous because he is a violent recidivist who "learned a lesson" to kill again if released.[18]

The Circuit majority acknowledged that its narrow view of *Simmons* is "difficult to police and arguably superficial," allowing prosecutors to evade *Simmons* by "encourag[ing] a jury to think about future dangerousness without expressly referring to that concept." JA1388-1389, *Rompilla v. Horn*, 355 F.3d at 266. But "[d]etermining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government . . . , is an enterprise that [this Court] ha[s] consistently eschewed." *Board of Cty. Com'rs v. Umbehr*, 518 U.S. 668, 679 (1996).

This prosecutor sent a future dangerousness message throughout his evidence, his questions to defense witnesses and his argument. The jury's questions show they got the message.

II. RELIEF SHOULD BE GRANTED BECAUSE OF COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING.

Petitioner was denied his Sixth Amendment right to effective assistance of counsel at capital sentencing:

[18] *Cf.* JA1401, *Rompilla v. Horn*, 355 F.3d at 272 (court acknowledges that its interpretation of the prosecutor's argument could be incorrect, and prosecutor could have "meant to *imply* that Rompilla would present a future danger if he was ever released from prison") (emphasis original).

counsel's representation was unconstitutionally deficient because they failed to reasonably investigate Petitioner's background; their investigative failures prejudiced Petitioner because the jury never heard significant mitigating evidence when deciding whether Petitioner should live or die.

A. Counsel Failed To Reasonably Investigate.

Effective capital counsel "conduct a *thorough* investigation of the defendant's background" for "*all reasonably available* mitigating evidence." *Wiggins v. Smith*, 123 S.Ct. 2527, 2535, 2537 (2003) (quoting *Williams*, 529 U.S. at 396, and American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (1989)) (second emphasis in *Wiggins*).[19] In particular, one of the first steps counsel should take as part of a "thorough investigation of the defendant's background" is to seek "reasonably available" records about the defendant's history, including records about his "educational history," his "prior adult and juvenile record," his "prior correctional experience" and his "medical history." ABA Guideline 11.4.1(D)(2)(c)-(d) (cited in *Wiggins*, 123 S.Ct. at 2537); *see also Wiggins*, 123 S.Ct. at 2532-33 (counsel ineffective for failing to develop social history from "social services, medical, and school records, as well as interviews with petitioner and numerous family members");

[19] The ABA Guidelines articulate "reasonable" professional "standards for capital defense work"; they are "norms" and "standards to which [this Court] long ha[s] referred as 'guides to determining what is reasonable'" under the Sixth Amendment. *Wiggins*, 123 S.Ct. at 2536-37 (citing *Strickland*; *Williams*).

Williams, 529 U.S. at 395-96 (counsel ineffective for failing to obtain defendant's juvenile records).

Many records about Petitioner's history were "reasonably available" to trial counsel – *e.g.*, school records were maintained across the street from the courthouse; prior convictions and juvenile records were available from the local courts; prison records were in the court file on the prior convictions (or could have been obtained from the prison); medical records were available in the same local hospital where the Commonwealth had Petitioner's blood tested for this trial. But counsel did not get records about Petitioner's history – not even the prior case records counsel knew the prosecutor would use for aggravation purposes in a jurisdiction where the prosecution can introduce the "facts and circumstances" of prior crimes.

Several features of this case make counsel's failure to seek records about Petitioner's history particularly unreasonable, highlighting the inadequacy of this investigation.

First, counsel knew the people they spoke to (Petitioner and some family members) were not useful sources of information about Petitioner's history. Thus, counsel knew they had, at best, only a "rudimentary knowledge of [Petitioner's] history from a narrow set of sources." *Wiggins*, 123 S.Ct. at 2537. Under these circumstances, effective counsel would have expanded their investigation beyond their "narrow set of sources," and would have sought other sources of background information. *See Wiggins*, 123 S.Ct. at 2532-33 (effective counsel would have "chronicled petitioner's bleak life history" by obtaining "social services, medical, and school records, as well as interviews with petitioner and numerous family members").

Although there are reasons why the people counsel spoke to were not useful sources of information, *see* Statement of the Case at 7, *supra*, in the end the reasons are largely unimportant. The point is that counsel knew they had a "narrow set of sources" and had not developed a life history. Counsel therefore should have looked into other sources, the most obvious of which were *the records*. Similarly, counsel "had reason to inquire further as to the availability of *other family members* . . . who did know more about Rompilla's youth." JA1419-1420, *Rompilla v. Horn*, 355 F.3d at 281 (Sloviter, J., dissenting). Petitioner's sisters Randi and Barbara were available and would have provided significant information, but counsel failed to speak to them. *See Williams*, 529 U.S. at 415-16 (counsel deficient where they presented testimony from mother and two friends but failed to interview and present other "friends, neighbors and family").

Second, defense lawyers in Pennsylvania know that adult and juvenile criminal records often are a repository of life history and mental health information. Pennsylvania felony conviction records include presentence reports, which generally address "the particular circumstances of the offense and the character of the defendant," as evidenced by, *inter alia*, "the social history of the offender, including family relationships"; "the educational background of the offender"; "the offender's medical history and, if desirable, a psychological or psychiatric report"; and "supplementary reports from clinics, institutions and other social agencies with which the offender has been involved." *Commonwealth v. Martin*, 351 A.2d 650, 658 & n.26 (Pa. 1976) (quoting ABA Project on Minimum Standards of Justice, Standards Relating to Probation, § 2.3 (Approved Draft, 1970)). Pennsylvania

lawyers also know that juvenile records contain "facts relating to the child's background, environment and prior history." *Commonwealth v. Hodovanich*, 251 A.2d 708, 709 (Pa. Super. 1969); *see also id.* at 710 n.2 ("The juvenile's 'parental background is explored, his school record is examined and, in effect, his entire life becomes open for inspection.'") (quoting Propper, *Juvenile Court Practice*, 30 TEMPLE L.Q. 28 (1956)). Effective counsel would have reviewed these records.

Third, counsel here knew that Petitioner left school in 9th grade, and counsel believed this suggested "problems in school." JA677-678. Effective counsel would have obtained the school records. *See Wiggins*, 123 S.Ct. at 2537 (counsel should "pursu[e] . . . leads" created by known information). For the same reason, effective counsel would have obtained the prior convictions and juvenile records since, as noted above, they were likely to include information about Petitioner's educational history.

Fourth, counsel knew, from police reports provided by the prosecutor in pre-trial discovery, L111-120, that Petitioner was drinking so heavily around the time of the offense that he was described as being incoherent and passing out. *See also* JA315-317 (habeas petition, describing police reports). The police reports also noted that one of the conditions of Petitioner's parole was that he "[m]ust not consume alcohol." L120; *see also* L111 (Petitioner violated parole by drinking). Furthermore, the prior crimes, like this one, occurred in a bar. The prior convictions court/prison records were an obvious source of information about the development of Petitioner's problems with alcohol, especially since abstaining from alcohol was a condition of parole. Effective counsel would have obtained the records.

Fifth, counsel knew the capital sentencing jury would learn that Petitioner spent thirteen years in prison before this offense. Capital defense lawyers know that "evidence bearing on the defendant's ability to adjust to prison life" can be mitigating. *Skipper v. South Carolina*, 476 U.S. 1, 6 (1986). Effective counsel would have obtained and reviewed Petitioner's prison records as a possible source of mitigating evidence. The need to obtain these records was particularly clear here because family members told counsel that their lack of knowledge about Petitioner arose in part from the fact that he was incarcerated for much of his life, beginning when he was a juvenile.

Sixth, counsel knew the Commonwealth would introduce evidence from the prior convictions court file as part of its aggravation evidence. Effective counsel would have reviewed that court file. *See Wiggins*, 123 S.Ct. at 2537 (counsel should seek "all reasonably available . . . evidence to rebut any aggravating evidence that may be introduced" (quoting ABA Guideline 11.4.1(C) (1989))).[20] However,

[20] *See also* ABA Guideline 11.8.5(A) (counsel should investigate at "earliest possible time" areas that may relate to aggravation); ABA Guideline 11.8.3(A) ("Counsel should seek information . . . to rebut the prosecution's sentencing case."); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 337 (1983) ("counsel must investigate . . . any evidence of other crimes or circumstances in the defendant's background which the prosecution may be permitted to introduce in aggravation"); *Battenfield v. Gibson*, 236 F.3d 1215, 1228-35 (10th Cir. 2001) (counsel ineffective for failing to investigate prior convictions aggravation, where investigation of prior convictions would have revealed mitigating evidence); *Starr v. Lockhart*, 23 F.3d 1280, 1285 (8th Cir. 1994) ("basic concerns" of capital counsel "are to neutralize the aggravating circumstances . . . and to present mitigating evidence"; counsel ineffective for failing to challenge aggravating circumstances); *Lewis v. Lane*, 832 F.2d 1446, 1453-58 (7th Cir. 1987) (capital counsel ineffective for failing to investigate defendant's criminal record where it was used to establish aggravating

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these lawyers did not take the rudimentary investigative step of looking at the file on the prior convictions.[21] The court and prison records in that file contained valuable mitigating evidence. Moreover, the entries in that file would have led an effective lawyer to the juvenile and school records, since they show Petitioner had impaired intelligence, mental problems and a juvenile history.

Counsel did not obtain the records appropriate to a thorough investigation for mitigating evidence. Their investigation was not reasonable. The jury did not hear the substantial mitigation that a real investigation would have disclosed.

B. Petitioner Was Prejudiced.

Capital counsel needs to thoroughly investigate in order to present to the jury the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). When that does not occur, the defendant has not been treated as a "'uniquely individual human bein[g],'" there is no "reliable determination that death is the appropriate sentence," *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *Woodson*, 428 U.S. at 304-05), and the death sentence is not a "reasoned moral response" to the

circumstance); *Esslinger v. Davis*, 44 F.3d 1515, 1529-30 (11th Cir. 1994) (non-capital counsel ineffective for failing to investigate defendant's criminal record where it was used to enhance sentence).

[21] Effective counsel also would have reviewed the juvenile files because Pennsylvania prosecutors can introduce juvenile adjudications to support the significant history of violent felonies aggravating circumstance. *See Baker*, 614 A.2d at 676.

offense and the offender, *Penry v. Johnson*, 532 U.S. 782, 788 (2001).

Even though they heard little mitigating evidence from the defense, these jurors deliberated for twelve hours. Valuable mitigating evidence was available. It would have provided a real case for life – evidence of childhood mistreatment and trauma, brain damage, mental retardation, alcoholism and serious mental and emotional disturbances. No doubt, this is evidence upon which a member of this jury reasonably could have relied to vote for a life sentence instead of death. This evidence also undermines the aggravation – the jury would have seen that there is a mitigating explanation for Petitioner's explosiveness and inability to conform to law. "Had the jury been able to place [this additional evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 123 S.Ct. at 2543.

C. Habeas Relief Is Appropriate.

The state court did not rule on prejudice. *See* JA271, *Commonwealth v. Rompilla*, 721 A.2d at 789 n.3. Thus, habeas "review is not circumscribed by a state court conclusion with respect to prejudice." *Wiggins*, 123 S.Ct. at 2542.

With respect to counsel's investigation, the Pennsylvania Supreme Court tried to excuse counsel's failure to seek records because: (1) the records supposedly are "not entirely helpful"; (2) counsel hired mental health experts; and (3) counsel conversed with Petitioner and some family members. JA272-273, *Commonwealth v. Rompilla*, 721 A.2d at 790. The state court did not address counsel's

failure to obtain the prior convictions records in order to investigate the Commonwealth's aggravation. Nor did the state court address counsel's failure to interview the two sisters who would have provided mitigation about Petitioner's traumatic childhood and the development of his mental problems and alcoholism. *See* JA1419, *Rompilla v. Horn*, 355 F.3d at 280 (Sloviter, J., dissenting).

The state court's decision is contrary to and an unreasonable application of clearly established federal law, § 2254(d)(1), and is based upon an unreasonable determination of facts, § 2254(d)(2).

1. The Pennsylvania Supreme Court tried to excuse counsel's failure to obtain records because the post-conviction hearing court said the records were "not entirely helpful." JA272, *Commonwealth v. Rompilla*, 721 A.2d at 790. This approach is contrary to, or at least an unreasonable application of, *Strickland* because it attempts to use the *contents* of records *never seen by counsel* to justify counsel's failure to get them. The state court thus improperly tried to use hindsight to justify counsel's investigative failure.[22]

Moreover, the post-conviction hearing court's actual "not entirely helpful" finding, which the Pennsylvania

[22] *See Williams*, 529 U.S. at 396 ("Of course, not all of the [unpresented] evidence [in records] was favorable to Williams. . . . But . . . failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision" because counsel did not adequately investigate and did not know what the records contained); *Wiggins*, 123 S.Ct. at 2535 (same); *Strickland*, 466 U.S. at 689 (reviewing court must evaluate counsel's "conduct from counsel's perspective at the time"); *Kimmelman v. Morrison*, 477 U.S. 365, 386-87 (1986) (evidence not known to counsel "sheds no light on the reasonableness of counsel's decision").

Supreme Court adopted, was that records about Petitioner's impaired intelligence and learning problems "were not entirely helpful to Mr. Rompilla's case. While they did reveal a low IQ, *low IQ can simply be part of the bell curve and a learning disability is not necessarily caused by an organic defect.*" JA264. This statement would apply to every person with impaired intellectual functioning. An assertion that such records are unhelpful is legally and factually unreasonable under § 2254(d)(1) & (2). *See Tennard v. Dretke*, 124 S.Ct. 2562, 2572 (2004) ("low IQ" of 69 is "obviously" mitigating); *Wiggins*, 123 S.Ct. at 2531 (observing, with respect to defendant with an IQ of 79, that his "diminished mental capacities further augment his mitigation case"). Petitioner's jury should have known he was impaired.

2. The Pennsylvania Supreme Court's suggestion that hiring mental health experts absolved counsel of the duty to investigate Petitioner's background is also unreasonable. "[C]ounsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background." *Wiggins*, 123 S.Ct. at 2541. Whether counsel hires mental health experts or not, counsel in a capital case has an independent "obligation to conduct a thorough investigation of the defendant's background." *Id.* at 2535 (quoting *Williams*, 529 U.S. at 396).

Moreover, counsel here did not ask the doctors to collect life history mitigation. Counsel only asked the doctors for opinions on Petitioner's mental state at the time of the offense and competency to stand trial. JA474, JA476. And even if counsel had asked the doctors to prepare a social history, the doctors themselves would have had the same "narrow set of sources" as did counsel,

who provided no life history records or information to the doctors.

3. The Pennsylvania Supreme Court was also unreasonable when it attempted to excuse counsel's failure to obtain any records because counsel spoke to Petitioner and some family members. Counsel *knew* they had not obtained useful background information from these sources. Counsel *wanted* to gather available mitigating information. Counsel did *not* curtail their investigation because of a tactical concern.

Effective counsel would have expanded their investigation beyond this "narrow set of sources" who had not provided even a "rudimentary knowledge" of Petitioner's background. *See Wiggins*, 123 S.Ct. at 2537. However, these lawyers obtained no records at all about Petitioner's history – not even records about the prior convictions used for aggravation purposes by the Commonwealth. They provided no life history records to the doctors. They were in no position to make reasonable decisions about the presentation of a mitigation case to the jury. They did not investigate thoroughly for reasonably available mitigation.

CONCLUSION

Petitioner's death sentence is unconstitutional. Habeas relief is appropriate.

Respectfully submitted,

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